84-1198

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE STATE OF TEXAS,
Petitioner
vs.
SANFORD JAMES McCULLOUGH,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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48 pp

QUESTION PRESENTED

Does the Equal Protection Clause of the Fourteenth Amendment require application of the presumption of judicial vindictiveness stated in *North Carolina v. Pearce*, 395 U.S. 711, or is such presumption rebutted, in a jurisdiction where the defendant has the right to elect to have either the jury or the judge assess punishment, under the following facts:

(1) Defendant elected to have the jury assess punishment at his first trial;

(2) Defendant filed a Motion for New Trial which was granted by the presiding judge;

(3) Defendant elected at his second trial to have the same presiding judge determine his punishment;

(4) The same presiding judge assessed greater punishment than the jury assessed at the first trial;

(5) The same presiding judge filed Findings of Fact and Conclusions of Law stating reasons based on evidence first heard at the defendant's second trial, for assessing the greater punishment?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

THE STATE OF TEXAS
Petitioner,

vs.

SANFORD JAMES McCULLOUGH
Respondent

PETITION FOR WRIT OF CERTIORARI,

CRIMINAL CASE

Petitioner, the State of Texas, respectfully requests that a Writ of Certiorari issue to review the Decision and Judgment of the Court of Criminal Appeals of Texas in the case of the *State of Texas* v. *Sanford James McCullough*, Number 351-83 in that Court, by which it affirmed that part of the Judgment of the Seventh Court of Appeals of Texas, which struck down the trial judge's assessment of greater punishment (50 years) at a second trial than the jury assessed (20 years) at Respondent's first trial; conclusively presuming judicial vindictiveness by the trial judge after that trial judge who presided at the first trial had granted Respondent's Motion for New Trial without an appeal, even though the Respondent had selected that judge instead of the jury to assess his punishment at his second trial; and the same judge, upon assessing greater

punishment gave substantive reasons, based upon evidence at Respondent's second trial, for doing so, those reasons being a part of the record. In that action of the Court of Criminal Appeals from which this relief is sought, that court did not follow this honorable court's rule announced in *Wasman v. United States*, 468 U.S. _____, 82 L.Ed2d 424, 104 S. Ct. _____.

OPINIONS BELOW

The Opinion dated February 3, 1983, of the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, in its Cause No. 07-81-0141-CR, reversing the trial court as to sentencing and reforming the Respondent's punishment in this cause to the 20 years originally assessed by the jury at his first trial, is reproduced in the Appendix as Appendix "A". It is not yet reported, but is in the process of being reported.

The Opinion dated March 18, 1983, of the Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo, in the same cause, on the State's Motion for Rehearing, overruling this Petitioner's Motion for Rehearing is reproduced in the Appendix as Appendix "B". It is not yet reported, but is in the process of being reported.

The Opinion of the Texas Court of Criminal Appeals, in this same cause, but numbered 351-83 in that Court, on Discretionary Review, delivered December 7, 1983, is reproduced in the Appendix as Appendix "C". It is not yet reported, but is in the process of being reported.

The Opinion of the Texas Court of Criminal Appeals in this cause, under its same cause number, on the State's Motion for Rehearing on Petition for Discretionary Review was delivered December 5, 1984, and is reproduced in this Appendix as Appendix "D". It is not yet reported, but is in the process of being reported.

JURISDICTION

Within the time allowed by applicable rules and statutes this matter was presented to the Texas Court of Criminal Appeals by the State, as Petitioner, seeking Discretionary Review. The Court of Criminal Appeals of Texas granted Discretionary Review of the decision of the Amarillo Court of Civil Appeals [The Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo]. That Court rendered its original opinion, and thereafter granted Petitioner's Motion for Rehearing. Upon granting Rehearing, the Court of Criminal Appeals took under advisement the relief for which this Writ is sought. On December 5, 1984, the Court of Criminal Appeals delivered its final Opinion herein [Appendix "D"] concerning the question at bar. Petitioner, on that same date, December 5, 1984, filed with the Texas Court of Criminal Appeals its Motion to Stay Execution of Mandate, which had not been acted upon at the time of this writing. Also, on December 5, 1984, Petitioner filed its Second Motion for Rehearing and motion for leave to file the same with the Court of Criminal Appeals. The court has not acted upon the Second Motion for Rehearing nor on the Leave to file the same. Therefore, it is an appropriate presumption that the action of the Court of Criminal Appeals on December 5, 1984, is final. There is no statutory privilege to file a second Motion for Rehearing, although the Court of Criminal Appeals is possessed of power to grant the same. Relief under the Constitution is sought from the December 5, 1984, action of the Texas Court of Criminal Appeals. Petitioner has raised the same issue, indicated above in the Question Presented, at every level and stage of these proceedings. Jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATUTES INVOLVED

Article 37.07, Code of Criminal Procedure of Texas, expresses the Statutory Requirements regarding the as-

sessment of the penalty upon conviction in criminal cases. Essentially it provides for a bifurcated trial, with the finding of guilt or innocence being the first duty of the jury, with Section 2(b) thereof providing it to be the responsibility of the judge to assess the punishment applicable to the offense; however, that statute in Section 2(b)(2) permits the defendant to make a written election at the time he enters his plea in open court, to choose as the determiner of his punishment that same jury which determined his guilt or innocence. If no election is made, then the trial judge is required to assess punishment.

Article 37.07, Texas Code of Criminal Procedure is reproduced in the Appendix as Appendix "E".

CONSTITUTIONAL PROVISION AT ISSUE

Amendment XIV of the United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of Citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In September 1980, in a two-part trial, the Respondent was found guilty by the jury of murder. Thereupon, he selected the jury to assess his punishment as he is permitted to do under Article 37.07, Texas Code of Criminal Procedure (Appendix "E"). The jury assessed his punishment at 20

years confinement. Within the statutory time, Respondent (defendant) filed his Motion for New Trial to the same court and same judge that conducted his first trial. In his Motion he alleged that the trial judge erred in not granting his motions for mistrial during the first trial, asserting improper jury argument by the prosecution and also asserting improper cross-examination by the state of a defense witness. That same trial judge granted Respondent's Motion for New Trial. Upon re-trial before that same Judge, another jury again found Respondent guilty of murder. Under the Statute quoted in Appendix "E", [Article 37.07, Texas Code of Criminal Procedure,] the Defendant, (Respondent herein) did not elect this time in writing to have the jury assess his punishment, the effect of which was to choose the trial judge to determine the penalty for the murder for which the jury had convicted him. At the end of a hearing on punishment following the second trial, the trial judge assessed Respondent's punishment at 50 years confinement. Thereafter, upon motion of the Respondent, the trial judge prepared and filed in the record Written Findings of Fact and Conclusions of Law [Appendix "F" herein]. By those findings the judge expressed a number of reasons, supported by evidence first heard at the defendant's second trial, for determining and assessing greater punishment than the jury had assessed at the first trial. [Those reasons are set forth in Appendix "F".]

The defendant (Respondent herein), by assignment of error, raised the unconstitutionality of the second sentence on the ground that the Judge's assessment of 50 years confinement, after the jury in the first trial had assessed 20 years confinement, violated the rule in *North Carolina v. Pearce, 395* U.S. *711*, even though the jury and not the Judge determined the first sentence, and even though the Judge expressed in the record her reasons, based primarily on evidence first heard at respondent's second trial, for determining the greater penalty at the second trial. Those reasons indicated clear reasons to find a complete absence of vindictiveness on the part of the judge.

On that appeal by Respondent, the Amarillo intermediate Appellate Court, [Court of Appeals for the 7th Supreme Judicial District of Texas] found that the increased punishment assessed by the judge at the second trial violated the principles of *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed2d 656 (1969). Our case at bar differs from Pearce because: (1) The jury had assessed the original punishment at the first trial because of written pleadings of Respondent selecting the jury to make the assessment (2) The second trial occurred because the trial judge who presided at both trials granted the Respondent's Motion for New Trial; (3) By not selecting the jury to assess punishment at the second trial, the Respondent, through a Texas Rule of Procedure, forced the determination of his punishment at the second trial upon the trial judge; (4) The trial judge, following determination and assessment of punishment, filed in the record written reasons for determination and assessment of greater punishment than the jury assessed at the first trial. All of the enumerated factors set forth above are elements that distinguish this case from the facts of *North Carolina v. Pearce*, cited above. Both the Court of Appeals and the Texas Court of Criminal Appeals declined to recognize these distinctions.

The reasons appearing in the record of this case, given by the trial judge, (Appendix "F") for imposing a greater sentence than did the jury at the first trial, indicate primarily information that came to the judge's attention from evidence adduced at the second trial itself, including, but not limited to the demeanor and actions of the Respondent at his second trial, consistent with the language of the Supreme Court in the *North Carolina v. Pearce* opinion and in its recent *Wasman v. United States* opinion. For emphasis and greater facility in referring to the reasons expressed by the trial judge for assessing greater punishment the same are reproduced in the Appendix at Appendix "F".

REASONS FOR GRANTING WRIT

I.

IF THE FACTS RELATED IN THE QUESTION PRESENTED CREATE A PRESUMPTION OF JUDICIAL VINDICTIVENESS UNDER THE HOLDING OF THIS COURT IN *NORTH CAROLINA* V. *PEARCE* 395 U.S. 711, THEN THAT PRESUMPTION IS REBUTTED ACCORDING TO THE RATIONALE OF THIS COURT IN *WASMAN* V. *UNITED STATES*, No. 83-173-468, U.S. _____, 82 L.Ed.2d 424, 104 S. Ct. ____, AND THE TEXAS COURT OF CRIMINAL APPEALS HAS FAILED TO FOLLOW THIS HONORABLE COURT'S MANDATE AS STATED IN *WASMAN* AS TO THE REBUTTING OF SUCH A PRESUMPTION.

The constitutional question raised herein was initially raised by Respondent through assignment of error from the trial court to the intermediate Texas Appellate Court called The Court of Appeals for the Seventh Supreme Judicial District of Texas, at Amarillo. When decided contrary to the State's prayers in that appeal, the question was raised by the State in its Petition for Discretionary Review to the Texas Court of Criminal Appeals, the highest Texas Criminal Appellate Court. That Court summarily rejected the position herein urged by the Petitioner, and then, on Motion for Rehearing, re-considered its decision, and decided to, and did, write on the subject, finally concluding that to find in favor of this Petitioner would transgress the "prophylactic rule", presuming judicial misconduct, which that Court held to have been announced by the United States Supreme Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969). Petitioner contends that its position herein is consistent with the later clarification of the rule announced by this court in *Wasman v. United States*, 468 U.S. _____, 82 L.Ed 2d 424, 104 S. Ct. _____. If Petitioner's position announced herein is not consistent with *Wasman*, then the ruling of this Court in both cases is distinguishable from, and should be distinguished now by this court from the circumstances that exist in our case at bar. There is a strong need in the several states jurisdictions having statutes and procedural sentencing rules similar to those of Texas (empowering defendant to select between jury and judge as the sentencing agent) for a clarification of the constitutional law applicable to situations such as our courts have found and will find themselves facing. In such jurisdictions, the result is that a defendant upon retrial sets his own range of punishment, putting a cap on the upper limit of the possible punishment he might receive, thereby emasculating the State legislature's intent as to what the full punishment range should be.

II.

APPLICATION BY THE TEXAS COURTS OF THE *PEARCE* RULE IN THE CIRCUMSTANCES OF THE INSTANT CASE HAS LEFT NO ROOM WITHIN WHICH ANY TRIAL JUDGE CAN INVOKE HIS OWN STANDARDS, PRINCIPLES, AND INDIVIDUALITY, OR APPLY HIS OWN CONSCIENTIOUS DETERMINATION AND APPLICATION OF A JUST SENTENCE IN ANY SECOND TRIAL IN THE ABSENCE OF FURTHER MISCONDUCT OF A DEFENDANT BETWEEN THE TIMES OF THE TWO TRIALS.

Wasman v. *United States* 82 L.Ed2d 424, was mentioned in a footnote of the Opinion of the Court of Criminal Appeals in the instant case (Appendix "D" Page A-12); but

the conclusions in *Wasman* were either misunderstood or ignored by the Court of Criminal Appeals. *Wasman* has clarified the holding in *Pearce*. In effect, *Wasman* announced that a trial court will not be limited, in a determination of misconduct by a defendant, to conduct occurring after his first trial, as proof that a re-sentencing judge, in imposing a greater sentence at a second trial, was not motivated by any vindictiveness or retaliatory attitude. Instead, Wasman indicates that a trial judge may consider, upon resentencing, events that cast additional light upon the defendant's life, health, habits, conduct, and mental and moral propensities as rebutting the presumption of vindictiveness; but that such events need not be confined to subsequent misconduct of a defendant that occurred later than his first trial.

The essence of the holding in *Wasman* is that if the resentencing authority expresses valid reasons supporting a greater sentence than was assessed in the first trial, then such greater sentence is constitutionally sound.

The opinion of the Texas Court of Criminal Appeals indicates that Wasman was either not considered, not followed, or not understood. That Court did not consider any of the circumstances found by the trial judge to exist from the record during the re-trial of this case that would permit the trial judge's actions in assessing a greater punishment to be cleansed from presumption of vindictiveness required by the Pearce opinion. Instead, the Court of Criminal Appeals fell under the same misunderstanding of the rule in Pearce as did the Amarillo Court of Appeals whose opinion it reviewed and affirmed. This misunderstanding of the gravaman of *Pearce* is indicated in the Footnote to the opinion of the Court of Appeals written by Associate Justice Richard Countiss, being the footnote appearing on page A-7 of Appendix "A" where the Amarillo Court of Appeals said:

"This case demonstrates the excessive scope of *Pearce*. The trial judge filed detailed and valid reasons for the heavier punishment and there is nothing in the record to indicate that the increased punishment resulted from vindictiveness. However, the reasons affirmatively supported by evidence are based on events occurring during or after the crime but before the first trial. Although these matters were not brought out at the first trial, they cannot be used to increase punishment because none occurred *after* the first trial. Thus, the Supreme Court has established a conclusive presumption that the judge is vindictive if increased punishment is not based on post-first-trial acts by the defendant."
[Page 6 of the Opinion]

Thus, we are now faced, before this court, with circumstances in which both of the appellate steps through the Texas Courts below have resulted in a clear indication of a misunderstanding and a misapplication of the *Pearce* rule as clarified in *Wasman*.

The prophylactic, narrow, *Pearce* rule should not be applied under circumstances in which a jury has determined the guilt and sentence in the first trial, and the trial judge has conceded that there was error meriting a second trial and granted a new trial; and then, the trial judge, when selected by a defendant to administer his punishment following a second guilty verdict, be presumed to be motivated by vindictiveness in every occasion wherein a more severe penalty is assessed. Having been placed in such a position of presumed vindictiveness upon any increasing of the sentence, a trial judge should be permitted to rebut the *Pearce* presumption if his findings indicate sound, substantial, and credible reasons for such determination of sentence. To stifle the sentencer's own princi-

ples, individuality, and conscience under such circumstances is to distort the intention of the due process clause of the fourteenth amendment to the Constitution.

In *Wasman* v. *United States*, this court eruditely pointed out that the holding in North Carolina v. Pearce is contradictory and conflicting. On page 668 of the Pearce Opinion, found in U.S. Supreme Court Reports, in Section II-C of that opinion this court said:

> "We hold, therefore, that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded, in order words, from imposing a new sentence, whether greater or less than the original sentence, IN THE LIGHT OF EVENTS SUBSEQUENT TO THE FIRST TRIAL THAT MAY HAVE THROWN NEW LIGHT UPON THE DEFENDANT'S LIFE, HEALTH, HABITS, CONDUCT, and MENTAL AND MORAL PROPENSITIES."
> [emphasis ours]

It is that which is quoted above herein that was grasped by this Court in Wasman as the true holding of the court in *Pearce*. That holding does not impose the improper restrictions set forth by the Texas Court of Appeals under circumstances such as ours. It should be announced by this Court in an opinion on the question posed herein that no such restrictions were intended by the due process clause of the fourteenth amendment to be imposed upon the several states in such circumstances as those at bar in this case. It cannot be denied that the holding in Pearce quoted above is much more reasonable under the constitution than a holding that restricts a trial judge in the imposition of a sentence only to a consideration of improper conduct actually committed by a defendant later than his first trial.

The holding, quoted above, from *Pearce*, is distinctive from the interpretation placed thereon by the Texas Court of Appeals and the Texas Court of Criminal Appeals. On the same page as the above quotation from Pearce, that opinion continues to direct as follows:

> "Such information [as a basis for a more severe resentence] may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, *or possibly from other sources* [emphasis added].

The Pearce opinion utters a rather broad assertion that "due process requires that a defendant be freed of apprehension of any retaliatory motivation on the part of the sentencing judge". Petitioner submits that perhaps the writer of the opinion would have better said that the rule should be — and we submit that such a rule, in effect, was announced in the *Wasman* opinion —

> That the constitution should not be held to require a judge to free a defendant from misapprehension; only that a judge himself or herself must be free from any guilt of retaliatory or vindictive motivation in determining what punishment should fit the crime for which the defendant has been found guilty, based upon that judge's principles, training, experience, and judgment.

Wasman indicates that such freedom from vindictive motivation must appear from the record. We submit that our circumstances together with our record in the case at bar accomplishes that required freedom.

The requirements of *Wasman* can be accomplished by the re-sentencing Judge carefully assigning reasons for the increased punishment, freed from the chronological and substantive limits of considering only a defendant's conduct between two trials. Application of this rule is especially important in a jurisdiction allowing a judge or jury assessment of punishment, to insure that a defendant cannot forever set his own range of punishment in subsequent trials.

III.

UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT A PRESUMPTION OF JUDICIAL VINDICTIVENESS SHOULD NOT ARISE

(1) IN A CASE WHERE A DEFENDANT, UNDER THE AUTHORITY OF PROCEDURAL RULES, ELECTS ONE SENTENCING AUTHORITY (A JURY) TO ASSESS HIS PUNISHMENT UPON CONVICTION AT HIS FIRST TRIAL, THEN AT A RE-TRIAL HE ELECTS ANOTHER SENTENCING AUTHORITY (THE JUDGE) TO RESENTENCE HIM, WHEREUPON THE JUDGE DIRECTS GREATER PUNISHMENT THAN THE JURY DID.

(2) HOWEVER, IF IN SUCH CIRCUMSTANCES SUCH A PRESUMPTION OF VINDICTIVENESS DOES ARISE, THEN THE JUDGE WHO ASSESSES GREATER PUNISHMENT SHOULD NOT BE LIMITED, IN REBUTTING SUCH A PRESUMPTION, TO A CONSIDERATION ONLY OF EVENTS IN THE LIFE OF THE DEFENDANT THAT OCCURRED LATER THAN THE FIRST TRIAL, FROM WHICH

TO EXPRESS HIS CONSTITUTIONAL REASONS FOR INCREASING THE PUNISHMENT OVER THAT ORIGINALLY ASSESSED BY THE JURY IN THE FIRST TRIAL.

(3) SUCH A RULE, AMONG OTHER EVILS, EXPOSES A DEFENDANT TO BEING PUNISHED, IN PART, FOR CONDUCT LATER THAN, AND UNRELATED TO, THE OFFENSE FOR WHICH HE WAS TRIED, CONVICTED, AND SENTENCED.

On page 431 of the *Wasman* opinion in 82 L.Ed2nd, the court said:

> "Because of its "severity" this court has been chary about extending the Pearce presumption of Vindictiveness when the likelihood of vindictiveness is not as pronounced as in *Pearce and Blackledge*".

In *Blackledge* v. *Perry*, 417 U.S. 21, referred to in the preceding paragraph hereof, the Court struck down a re-indictment by the prosecutor following the defendant's successful appeal, under circumstances where the prosecutor sought and obtained an indictment for a felony offense in order to proceed to a second trial seeking greater punishment, when the first trial had been for a misdemeanor providing for a much smaller range of punishment to be assessed against that defendant. Even there, this court expressed, in the recent *Wasman* opinion, that an acceptable explanation from the prosecutor in the record for his action may have rebutted the presumption of vindictiveness. It is clear that within the range of strong indicia of vindictiveness, the *Blackledge* case carries far greater bases for that presumption than any indicated in our case at bar. But, even in *Blackledge* this court did not demand post-first-trial misconduct by the defendant to

serve as an acceptable basis for such prosecutorial or judicial actions.

Page 433 of the opinion in *Wasman* contains a significant expression by this court relating to this third reason why our Writ should be granted by this court. It is quoted as follows:

> "If it was not clear from the court's holding in *Pearce* it is clear from our subsequent cases applying *Pearce* that DUE PROCESS DOES NOT IN ANY SENSE FORBID ENHANCED SENTENCES OR CHARGES, BUT ONLY ENHANCEMENT MOTIVATED BY ACTUAL VINDICTIVENESS TOWARD THE DEFENDANT FOR HAVING EXERCISED GUARANTEED RIGHTS. IN *PEARCE* AND IN *BLACKLEDGE*, THE COURT "PRESUMED" THAT THE INCREASED SENTENCE AND CHARGE WERE THE PRODUCTS OF ACTUAL VINDICTIVENESS AROUSED BY THE DEFENDANT'S APPEALS. IT HELD THAT THE DEFENDANT'S RIGHT TO DUE PROCESS WAS VIOLATED NOT BECAUSE THE SENTENCE AND CHARGE WERE ENHANCED, BUT BECAUSE THERE WAS NO EVIDENCE INTRODUCED TO REBUT THE PRESUMPTION THAT ACTUAL VINDICTIVENESS WAS BEHIND THE INCREASES. IN OTHER WORDS, BY OPERATION OF LAW, THE INCREASES WERE DEEMED MOTIVATED BY VINDICTIVENESS."

With reference to the foregoing expression by the Supreme Court, our circumstances at bar are so vastly different from either *Blackledge* or *Pearce*, that such presumptions

of vindictiveness should either not be permitted to apply in our circumstances, or if they are so permitted, then the errors of our Texas Courts in interpreting the Pearce Rule should be corrected by what has been held in *Wasman*. Essentially, the errors in demanding only post-first-trial misconduct to serve as the basis for acceptable reasons for increased re-sentencing by trial judge following jury first sentence are clearly indicated in the opinion in *Wasman*. This is further revealed in the following portion of the *Wasman* opinion found on Page 435 of 82 L.Ed 2d:

> "There is no logical support for a distinction between events and conduct of the defendant occurring after the initial sentencing insofar as the kind of information that may be relied upon to show a nonvindictive motive is concerned.

The *Wasman* opinion cited *Williams* v. *New York*, 337 U.S. 241 in which the opinion declares that "the underlying philosophy of modern sentencing is to take into account the person as well as the crime by considering information concerning every aspect of a defendant's life.

We submit that our case at bar, as did the *Wasman* case

> "squarely presents a question of the scope of information that may be relied on by a sentencing authority to justify an increased sentence after retrial. . . ."

CONCLUSION AND PRAYER

Petitioner believes that this court should, and prays that it will apply the distinctions expressed in the *Wasman* decision, which have clarified the rule in *Pearce*, to correct the misunderstandings of the lower courts regarding judicial vindictiveness as well as the constitutional requirements for rebutting a presumption thereof where circum-

stances create such a presumption. Consequently, petitioner asks that a Writ of Certiorari issue to review the decisions of the Court of Appeals for the 7th Supreme Judicial District of Texas and the Court of Criminal Appeals of Texas.

Respectfully submitted,

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APPENDIX

Appendix "A"

NO. 07-81-0141-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH SUPREME JUDICIAL
DISTRICT OF TEXAS, AT AMARILLO
PANEL C
FEBRUARY 3, 1983

SANFORD JAMES McCULLOUGH, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT
OF RANDALL COUNTY;
251ST JUDICIAL DISTRICT; NO. 3442-C;
HONORABLE NAOMI HARNEY, JUDGE

Before REYNOLDS, C.J., and COUNTISS and BOYD, JJ.

Appellant was convicted of murder, § 19.02, Tex. Penal Code Ann. (Vernon 1974), and sentenced to 50 years in the penitentiary. He contends the trial court erred when it (1) refused to grant his motion for change of venue, (2) admitted bloody photographs of his victim, and (3) imposed a greater sentence on retrial than was imposed by the jury when appellant was first tried for the crime. We reform and affirm.

In September, 1980, appellant was convicted of murder and assessed 20 years in the penitentiary by a jury. Subsequently, appellant's motion for new trial was granted and he was tried again in December, 1980. At the second trial, the question of guilt was again tried before a jury, but appellant permitted the trial judge to assess punishment. The judge, who had also presided at the first trial, assessed 50 years in the penitentiary.

In the interim between the first and second trial, appellant moved for a change of venue under art. 31.03, Tex. Code Crim. Pro. Ann. (Vernon Supp. 1981), with supporting affidavits, alleging that there was so great a prejudice against him in the county that he could not obtain a fair trial. The State controverted the motion and the trial court heard evidence from various witnesses. The State presented evidence that appellant could receive a fair trial in the county and appellant presented evidence that he could not. Appellant also introduced evidence of news media coverage of the crime and his first trial and conviction. The trial court's denial of his motion is the basis for his first ground of error.

Where, as here, the propriety of a change of venue is contested, the trial court's resolution of the dispute on its merits after a hearing will be reversed only if the court abused its discretion. McManus v. State, 591 S.W.2d 505, 516 (Tex. Cr. App. 1980). When conflicting evidence on the issue is presented, the court seldom abuses its discretion by denying the motion, Chappell v. State, 519 S.W.2d 453, 457 (Tex. Cr. App. 1975), even if the case has been publicized by the news media. Morris v. State, 488 S.W.2d 768, 771 (Tex. Cr. App. 1973).

In this case, we find no error in the denial of the motion. Credible conflicting evidence was presented and the trial court resolved the conflict against appellant. By doing so, it did not abuse its discretion. Ground of error one is overruled.

By his second ground, appellant contends the trial court erred in admitting seven photographs. The color photographs depict the victim's cuts and wounds and the murder scene, the victim's bedroom, in vivid and gruesome detail.

Appellant advances two arguments against the admissibility of the photographs. First, he says, they were not material because the defense stipulated that the victim was stabbed to death. Second, assuming some of the photographs were admissible, appellant argues that others were cumulative, and introduced only to inflame and prejudice the jury.

In Martin v. State, 475 S.W.2d 265, 267 (Tex. Cr. App. 1972), the general rule for admission of photographs in a criminal case is stated:

> We hold that if a photograph is competent, material and relevant to the issue on trial, it is not rendered inadmissible merely because it is gruesome or might tend to arouse the passions of the jury, unless it is offered solely to inflame the minds of the jury. If a verbal description of the body and the scene would be admissible, a photograph depicting the same is admissible.
> (Footnotes omitted.)

Accord: Terry v. State, 491 S.W.2d 161, 163 (Tex. Cr. App. 1973).

The trial court did not abuse its discretion by admitting the photographs. First, the appellant cannot, by stipulating the cause of death, deprive the State of the duty and function of presenting all relevant evidence to the jury, "nor avoid facing the full facts of the crime." Harrison v. State, 501 S.W.2d 668, 669 (Tex. Cr. App. 1973).

Likewise, we do not agree that some of the photographs were merely cumulative and used solely to inflame and prejudice the jury. The photographs are extremely unpleasant to observe, but that does not make them inadmissible. Martin v. State, *supra*. The first four depict the victim or the scene from different angles and perspectives and aid the fact finder in understanding what occurred at the scene. The last three show the victim after the blood had been cleaned off the body, and aid the fact finder in understanding the medical testimony. Thus, each photograph is material, competent and relevant, depicts matters verbally describable, and clarified or aids in the understanding of other evidence. Ground of error two is overruled.

By his third ground, appellant attacks the punishment assessed on retrial. After the jury assessed twenty years imprisonment in his first trial, appellant moved for a new trial and the State, apparently unhappy because only twenty years was assessed, agreed with the appellant that a new trial should be granted. The trial court then granted the motion. Upon retrial, appellant permitted the trial judge to assess punishment and she assessed 50 years imprisonment. In this court, appellant says the increased punishment violates the constitutional principles stated in North Carolina v. Pearce, 395 U.S. 711 (1969). We agree.

In *Pearce*, the Supreme Court found no constitutional impediment *per se* to the imposition of greater punishment on retrial of a defendant. It was concerned, however, with the possibility that greater punishment on retrial would be assessed solely to penalize a defendant who had successfully sought a new trial. To prevent that occurrence, the Court established a new rule for state courts, in the following language:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives

after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant *be freed* of apprehension of such a retaliatory motivation on the part of the sentencing judge.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. *Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

395 U.S. at 725. (Last emphasis added.)

Later, in Chaffin v. Stynchcombe, 412 U.S. 17 (1973), the Supreme Court limited *Pearce* to cases where the judge determines punishment, by holding that a jury can impose greater punishment upon retrial "so long as the jury is not informed of the prior sentence and the second sentence is not otherwise shown to be a product of vindictiveness." 412 U.S. at 35.[1]

[1] Although *Pearce* places the burden on the trial judge to prove that greater punishment on retrial was based on post-first-trial acts by the defendant, and was not the result of vindictiveness, (and conclusively presumes vindictiveness unless the sentence is properly justified), 395 U.S. at 725, *Chaffin* places the burden on the defendant to prove that the retrial jury was vindictive. 412 U.S. at 35.

As it must, our Court of Criminal Appeals has followed *Pearce* and Chaffin. In State v. Miller, 472 S.W.2d 269 (Tex. Cr. App. 1971), it held that a judge imposed penalty of 99 years, given on retrial after the jury in the first case had assessed 40 years, was illegal when not supported by the affirmative justification required by *Pearce*. It applied the same rule and found unassigned error in Bingham v. State, 523 S.W.2d 948, 949 (Tex. Cr. App. 1975), when the second judge, who assessed greater punishment, did not try the case the first time but was aware of the punishment assessed by the first judge and did not affirmatively support the sentence with the required data. Finally, in Ex parte Bowman, 523 S.W.2d 677 (Tex. Cr. App. 1975), the judge assessed greater punishment on retrial but filed findings of fact in which he attempted to justify the longer sentence. The essence of his findings was that additional evidence at the second trail about the violent nature of the crime and the defendant's prior record justified a longer sentence. In remanding the case of reassessment of punishment consistent with *Pearce*, the court commented, "None of the factors which the trial judge listed as the basis for his increased punishment occurred after the time of the original sentencing." 523 S.W.2d at 679.

The effect of the foregoing authorities on the sentence in this case is obvious. There is no evidence in the record before us of "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." The trial judge made extensive findings in support of her action but, as in *Bowman*, those properly supported by the evidence relate to the original crime, not to defendant's subsequent conduct. Thus, the increased

sentence was imposed in violation of *North Carolina v. Pearce.*[2] Ground of error three is sustained.

Appellant does not request a remand, asking instead that we reform the judgment to reflect a sentence of 20 years. Because that is the maximum sentence that can be imposed consistent with *Pearce*, the request is granted, the judgment is reformed to assess punishment of twenty years in the Texas Department of Corrections and the sentence is reformed to provide that appellant shall be confined in the Texas Department of Corrections for an indeterminate term of not less that 5 nor more than 20 years.[3] As reformed, the judgment is affirmed.

Richard N. Countiss
Associate Justice

Publish.

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[2] This case demonstrates the excessive scope of *Pearce*. The trial judge filed detailed and valid reasons for the heavier punishment and there is nothing in the record to indicate that the increased punishment resulted from vindictiveness. However, the reasons affirmatively supported by evidence are based on events occurring during or after the crime but before the first trial. Although those matters were not brought out at the first trial, they cannot be used to increase punishment because none occurred *after* the first trial. Thus, the Supreme Court has established a conclusive presumption that the judge is vindictive if increased punishment is not based on post-first-trial acts by the defendant.

[3] Because we are reforming a sentence entered prior to repeal of the indeterminate sentence law, compare art. 42.09 § 1, Tex. Code Crim. Pro. Ann. (Vernon 1979), with art. 42.09 § 1, Tex. Code Crim. Pro. Ann. (Vernon Supp. 1981), we have imposed the indeterminate sentence that should have been imposed by the trial court.

Appendix "B"

NO. 07-81-0141-CR
IN THE COURT OF APPEALS
FOR THE SEVENTH SUPREME JUDICIAL
DISTRICT OF TEXAS, AT AMARILLO
PANEL C
MARCH 18, 1983

SANFORD JAMES McCULLOUGH, APPELLANT
V.
THE STATE OF TEXAS, APPELLEE

FROM THE DISTRICT COURT
OF RANDALL COUNTY;
251ST JUDICIAL DISTRICT; NO. 3442-C;
HONORABLE NAOMI HARNEY, JUDGE

Before REYNOLDS, C.J., and COUNTISS and BOYD, JJ.

ON MOTION FOR REHEARING

In a well-reasoned brief in support of its motion for rehearing, the State suggests we erred in applying the principles of North Carolina v. Pearce, 395 U.S. 711 (1969), to the facts of this case. While we are satisfied that our conclusions were correct, and observe that most of the State's arguments were answered either directly or inferentially in our original opinion, two matters require additional discussion.

The State argues that this case materially differs from *Pearce* because this appellant was granted a new trial by

the trial judge, not by an appellate court. Although that is a difference, it is not a distinction. The purpose of *Pearce* is to forbid vindictiveness against a defendant who successfully pursues post-conviction remedies. As quoted from *Pearce* in our original opinion, due process "requires that vindictiveness against a defendant *for having successfully attacked his first conviction* must play no part in the sentence he received after a new trial." 395 U.S. at 725 (Emphasis added.) It is immaterial whether the new trial is obtained by an order from the trial court or by a judgment of an appellate court; the principles stated in *Pearce* still must be observed on retrial.

The State also contends, alternatively, that the trial judge complied with *Pearce* because her findings pinpoint identifiable conduct of the defendant occurring after the first sentencing proceeding. Specifically, says the State, she found an absence of remorse and indications of a life style by appellant that justified a greater sentence. Assuming *arguendo* that those findings articulate the kind of identifiable conduct contemplated by *Pearce*, we are unable to discern any evidence, i.e., "objective information," in the record affirmatively establishing the occurrence of those matters within the requisite time frame. As previously discussed, *Pearce* requires (1) objective information (2) of identifiable conduct (3) by the defendant (4) occurring after the time of the original sentencing proceeding. 395 U.S. at 725. Element (4), at least, was not proven.

We have carefully considered all matters raised by the State in its motion for rehearing, but are satisfied we have correctly applied precedents we are required to follow. The motion for rehearing is overruled.

Richard N. Countiss
Associate Justice

Appendix "C"

SANFORD JAMES McCULLOUGH, Appellant

NO. 351-83 v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, Seventh Supreme Judicial District of Texas (Potter County)

OPINION ON DISCRETIONARY REVIEW ON THE COURT'S OWN MOTION

Appellant was convicted of murder in September 1980 and assessed punishment at 20 years confinement by the jury. Subsequently appellant's motion for new trial was granted and upon re-trial, appellant was again found guilty by a jury. Appellant elected to have the court assess punishment at the second trial, and the trial judge, who had presided at the first trial, assessed punishment at 50 years confinement. On appeal, the Amarillo Court of Appeals found that the increased punishment assessed by the court violated the principles of North Carolina v. Pearce, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed.2d 656 (1969).[1] The Court did not remand the case but instead granted appellant's requested reformation of the punishment to 20 years. See McCullough v. State, ___ S.W.2d ___. We granted review on our own motion under Art. 44.45(a), V.A.C.C.P. to determine the authority of the Court of Appeals to reform the punishment.

Art. 44.24(b), V.A.C.C.P., provides:

> "(b) The courts of appeals and the Court of Criminal Appeals may affirm the judgment of the court below, or may reverse and remand for a new trial, or may reverse and dismiss the case, or may reform and correct the judgment or may enter any other appropriate

order as the law and nature of the case may require."

In Bogany v. State, ___S.W.2d ___ (Del. November 17, 1983), we held that the authority of a court on appeal to reform a judgment under Art. 44.24, supra, does not extend to the situation where the error involves punishment unauthorized by law. A judgment or sentence may only be reformed "to cause those instruments to reflect the true finding of the fact finder when such a finding is reflected in the verdict or, in a bench trial, the pronouncement of the court's finding." Milczanowski v. State, 645 S.W.2nd 445, 447 (Tex. Cr. App. 1983).

In the instant case the judgment of the trial court assessing 50 years confinement was found by the Court of Appeals to be unauthorized under North Carolina v. Pearce, supra. As such, the Court of Appeals was unable to reform the punishment and should have remanded the cause to the trial court for the proper assessment of punishment.[2]

Accordingly, the judgment of the Court of Appeals is reversed. The cause is remanded for assessment of punishment by the trial court in accordance with North Carolina v. Pearce, supra.

TOM G. DAVIS, Judge

(Delivered December 7, 1983)

EN BANC

[1] Appellant's other grounds of error were overruled by the Court of Appeals.

[2] Such procedure has been followed in opinions of this Court which have involved unlawful punishments under North Carolina v. Pearce, supra. See e.g., Lechuga v. State, 532 S.W.2d 581 (Tex. Cr. App. 1976); Ex parte Bowman, 523 S.W.2d 377 (Tex. Cr. App. 1975); Payton v. State, 506 S.W.2d 912 (Tex. Cr. App. 1974).

Appendix "D"

SANFORD JAMES McCULLOUGH, Appellant
NO. 351-83 vs.
THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, 7th Sup. Jud. Dist. RANDALL County

OPINION ON STATE'S MOTION FOR REHEARING ON PETITION FOR DISCRETIONARY REVIEW

The question presented on state's motion for rehearing is whether the presumption of vindictiveness established by North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), when a greater sentence is imposed following retrial, is applicable where a jury assesses punishment at the first trial, and a judge assesses punishment upon retrial.

In *Pearce*, a defendant who obtained a reversal of his conviction on appeal received a longer sentence from a judge on retrial than that originally imposed by the judge in the first trial. The United States Supreme Court stated that it would be a violation of the Due Process Clause of the Fourteenth Amendment for a trial court to impose a heavier sentence upon a reconvicted defendant "for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside." 89 S.Ct. at 2080. The Court noted, however, that "[t]he existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case." Id., n. 20. Thus the Court found it necessary to establish a prophylactic rule to protect defendants from actual vindictiveness as well as from the reasonable apprehension of vindictiveness that could deter a defendant from appealing a conviction:

"Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge."

"In order to assure the absence of such a motivation, we have concluded that *whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon ojective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.* And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." Id., 89 S.Ct. 2080, 2081.

Simply stated, the rule of *Pearce* is that a greater sentence given by a judge after a new trial is presumptively vindictive, and therefore illegal, unless the judge affirmatively bases the increased sentence on identifiable conduct[1] on the part of the defendant occurring after the time of the original sentencing proceeding.

In the instant case appellant was convicted of murder in September 1980, and assessed punishment at 20 years' confinement by a jury. Appellant subsequently moved for a new trial alleging that the trial judge erred in not granting appellant's motions for mistrial asserted for improper jury argument and the prosecutor's cross-examination of a witness regarding a co-defendant's confession. The trial court granted the motion for new trial, and appellant was retried for the same offense, *before the same judge who presided at the first trial.* At the second trial the jury again found appellant guilty of murder. Unlike the first trial, however, appellant did not request jury sentencing, and therefore, the trial court was required to assess punishment under Art. 37.07, Sec. 2(b), V.A.C.C.P., which provides in pertinent part:

> "[I]f a finding of guilty is returned, it shall then be the responsibility of the judge to assess punishment applicable to the offense; provided, however, that . . . in . . . cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury."

The trial court assessed punishment at 50 years, overruling appellant's contention that the 30 year increase in

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[1] The Supreme Court recently held that under *Pearce*, a sentence may be increased on retrial based on an intervening *event*, as well as on intervening *conduct*. Wasman v. United States, ___ U.S. ___, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). In *Wasman*, the Supreme Court upheld an increased sentence on retrial, where the intervening "event" relied on for the increased sentence was a conviction for a different offense, rendered after the first trial, but for conduct committed before the first trial, where the trial court stated that such conduct was not considered at the first sentencing proceeding.

sentence contravened the holding in North Carolina v. Pearce, supra. After assessing punishment and sentencing appellant, the trial court entered an order in response to appellant's motion for findings of fact. In the order the trial court stated that it found *Pearce* inapplicable to the instant case "because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial." The court also set out findings of fact attempting to justify the increased sentence for the record in the event that *Pearce* was found to be applicable on appeal.

The Court of Appeals found *Pearce* to be applicable, and also found that the trial court's findings of fact did not satisfy *Pearce*. Accordingly, the Court of Appeals held that the increased sentence was illegal, and reformed the sentence from 50 years to 20. We initially reviewed the Court of Appeals' opinion on our own motion solely to determine the authority of the Court of Appeals to reform the punishment. We held that the Court of Appeals was without authority to reform a sentence "unauthorized by law" and remanded the cause to the trial court for resentencing in accordance with *Pearce*, supra.

The state does not contend on rehearing that the trial court's findings of fact in support of the increased sentence satisfy *Pearce*. Cf. Wasman v. United States, ___ U.S. ___, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). Rather, the state asserts that *Pearce* is inapplicable when a jury first assesses punishment and a judge subsequently assesses punishment upon retrial.

It is clear that the rule of *Pearce* is not applicable when upon retrial, a *jury* renders a higher sentence than originally imposed at the first trial. Chaffin v. Stynchcombe, 412 U.S. 17, 93 S.Ct. 1977, 412 U.S. 17 (1973); see also Casias v. State, 452 S.W.2d 483; Gibson v. State, 448 S.W.2d 481. However, in holding *Pearce* inapplicable to jury resentencing, the Supreme Court in *Chaffin* noted three important distinctions: The Court stated that "[t]he first prerequisite

for the imposition of a retaliatory penalty is knowledge of the prior sentence." *Chaffin*, supra, 93 S.Ct. at 1982. In *Chaffin*, it was conceded that the jury was not informed of the prior sentence, and thus this first prerequisite was not present. The Court specifically noted, however, that "[t]he State agreed at oral argument that it would be improper to inform the jury of the prior sentence and that *Pearce* might be applied in a case which, either because of the highly publicized nature of the prior trial or because of some other irregularity, the jury was so informed." Id., at 1983, n. 14.

The second distinguishing factor noted by the Supreme Court in jury resentencing is that "the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction." Id. at 1983. Finally, the Court noted that "the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals."

Applying these factors to the case at bar, we find that the three important considerations of *Pearce* found inapplicable to jury resentencing in *Chaffin* are all present here: first, the trial judge obviously knew the sentence pronounced by the jury at the first trial, since she presided over the first trial. Second, the second sentence was in fact "meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required" a new trial. Finally, since the trial judge assessed punishment on retrial, the third element cited in *Chaffin* above is also present.

The state concedes that we have held *Pearce* to be applicable to precisely the same facts in Miller v. State, 472 S.W.2d 269. The state urges that *Miller* was wrongly decided. In light of the explicit language of *Chaffin*, supra, however, we cannot agree.

The fact that under Art. 37.07, Sec. 2(b), supra, appellant had a right to have the jury assess punishment on retrial, and chose not to do so, does not affect our determination; nor is it important that appellant chose to have the jury assess punishment at the first trial. As long as the Legislature allows defendants to elect between jury or judge punishments, defendants should be allowed to make that choice without fear of vindictiveness.

The state next suggests that through its decisions in Moon v. Maryland, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed.2d 262 (1970), (*Pearce* held inapplicable where defendant conceded no vindictiveness present); Colten v. Kentucky, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972) (*Pearce* held inapplicable in two-tier system involving trial de novo); and Michigan v. Payne, 412 U.S. 47, 93 S.Ct. 1966, 36 L.Ed.2d 736 (1973), (*Pearce* held not retroactive); the Supreme Court has retreated from the holding in *Pearce* and that *Pearce* is perhaps no longer viable. This contention is without merit. See Wasman v. United States, supra note 1, 104 S.Ct. 3217 (1984).[2]

The state's final contention is that *Pearce* is inapplicable "to a situation where a different sentencing authority assesses the punishment on retrial." Thus the state challenges the validity of our decision in Bingham v. State, 523 S.W.2d 948, where we held *Pearce* to be applicable when a judge assessed punishment at the first trial, and a different judge assessed a greater punishment upon remand. The state apparently overlooks the fact that in *Pearce* itself, a different judge assessed the punishment upon retrial. See

[2] Indeed in *Wasman*, in response to dicta in Chief Justice Burger's plurality opinion that *Pearce* only prohibits increased sentences based on *actual vindictiveness*, five Justices concurred, stating in substance that the *Pearce* presumption is not simply concerned with actual vindictiveness, but is also intended to protect against the reasonable apprehension of vindictiveness that could deter a defendant from seeking a new trial.

State v. Pearce, 145 S.E.2d 918; State v. Pearce, 151 S.E.2d 571; see also Chaffin v. Stynchcombe, supra, 93 S.Ct. at 1990, n. 4 (dissenting opinion).

In light of the foregoing, we conclude that the prophylactic rule set out in North Carolina v. Pearce, supra, is applicable to the instant case, and thus the state's contention on rehearing is overruled.

The state also asserts that we wrongly held on original submission that the Court of Appeals was without authority to reform appellant's sentence. We are convinced that this issue was properly decided on original submission and overrule this contention.

The state's motion for rehearing is overruled.

ODOM, Judge

(Delivered December 5, 1984)

En Banc

Appendix "E"

Article 37.07
Texas Code of Criminal Procedure

Art. 37.07. [693] [770] [750] *Verdict must be general; separate hearing on proper punishment*

Section 1. (a) The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the allegations in such pleas are true or untrue.

(b) If the plea is not guilty, they must find that the defendant is either guilty or not guilty, and, except as provided in Section 2, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.

(c) If the charging instrument contains more than one count or if two or more offenses are consolidated for trial pursuant to Chapter 3 of the Penal Code, the jury shall be instructed to return a finding of guilty or not guilty in a separate verdict as to each count and offense submitted to them.

Sec. 2. (a) In all criminal cases, other than misdemeanor cases of which the justice court or municipal court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

(b) *Except as provided in Article* **37.071,** *if a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense;*

provided, however, that (1) in any criminal action where the jury may recommend probation and defendant filed his sworn motion for probation before the trial began, and (2) in other cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

(c) Punishment shall be assessed on each count on which a finding of guilty has been returned.

Sec. 3. Evidence of prior criminal record in all criminal cases after a finding of guilty.

(a) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to the prior criminal record of the defendant, his general reputation and his character. The term prior criminal record means a final conviction in a court of record, or a probated or suspended sentence that has occurred prior to trial, or any final conviction material to the offense charged.

(b) After the introduction of such evidence has been concluded, and if the jury has the responsibility of assessing the punishment, the court shall give such additional written instructions as may be necessary and the order of procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence.

(c) *In cases where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail*

to agree, a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach.

(d) *When the judge assesses the punishment, and after the hearing of the evidence hereinabove provided for, he shall forthwith announce his decision in open court as to the punishment to be assessed.*

(e) Nothing herein contained shall be construed as affecting the admissibility of extraneous offenses on the question of guilt or innocence.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722. Amended by Acts 1967, 60th Leg., p. 1839, ch. 659, § 22, eff. Aug. 28, 1967; Acts 1973, 63rd Leg., p. 968, ch. 399, § 2(A), eff. Jan. 1, 1974; Acts 1973, 63rd Leg., p. 1126, ch. 426, art. 3, § 2, eff. June 14, 1973.

Appendix "F"

NO. 3442-C

The State Of Texas	I	In The 251st District Court
vs.	I	In And For
Sanford James McCullough	I	Randall County, Texas

ORDER IN RESPONSE TO THE DEFENDANT'S MOTION FOR FINDINGS OF FACT

In response to the Defendant's *Motion for Findings of Fact*, this Court finds that the rule prohibiting the assessment of a heavier sentence upon retrial under those circumstances set forth in *North Carolina v. Pearce*, 395 U.S. 711, 23 L.Ed.2d 656, 89 S. Ct. 2072 (and the cases following the precedent outlined in *Pearce*) does not apply to this case because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial. However, in the event that the Honorable Texas Court of Criminal Appeals holds that the *Pearce* doctrine is applicable to the facts of this case, then this Court makes the following findings of fact and conclusions of law solely for the appellate record:

1. Upon retrial, and after the time of the original sentencing proceeding, newly developed evidence, to-wit: the testimony of Carolyn Sue Hollison McCullough and Willie Lee Brown (witnesses who did not testify at the first trial), served to establish the following:

(a) The testimony of these two new witnesses directly implicated the defendant in the commission of the murder in question and showed what part he played in committing the offense.

(b) It also served to corroborate the testimony of Charles McCullough and Dr. Jose Diaz-Esquivel (both of whom testified at the first trial and again upon retrial) and gave added weight to the testimony of these witnesses.

(c) This new testimony had a direct bearing upon the credibility of three witnesses who testified at the first trial, namely: Charles McCullough, Dennis McCullough, and the defendant himself. The testimony of Carolyn Sue Hollison McCullough and Willie Lee Brown added to the credibility of the State's key witness, Charles McCullough, and detracted from the credibility of Dennis McCullough and the defendant who both testified for the defense.

(d) The testimony of Willie Lee Brown reinforced and lent credence to the testimony of Carolyn Sue Hollison McCullough, and vice versa.

(e) The testimony of these new witnesses shed new light upon the defendant's life, conduct, and his mental and moral propensities.

(f) This testimony had a direct effect upon the strength of the State's case at both the guilt and punishment phases of the trial.

(g) Finally, their testimony provided the court with insight as to this particular defendant's propensity to commit brutal crimes against persons and to constitute a future threat to society.

2. Upon retrial the defendant made it known to the court through his own testimony that he had been released from the penitentiary only 4 months before the murder in question occurred.

3. Upon retrial this court also considered the fact that if the defendant had elected to have the court set his punishment at the first trial, the court would have assessed more than the twenty (20) year sentence imposed by the jury.

4. Upon retrial and after the original sentencing proceeding, two more witnesses (Carolyn Sue Hollison McCullough and Willie Lee Brown) had indicated by their testimony that although the defendant admitted cutting the throat of the victim, he never showed any remorse to them for his acts.

5. The defendant himself upon retrial of a murder case in which the victim was repeatedly stabbed and beaten in a malicious and brutal manner never exhibited any signs of remorse whatsoever at any stage of the proceedings.

6. Upon retrial after having been found guilty of murder for a second time by a jury and after having made known to the court that he had been involved in numerous criminal offenses and had served time in the penitentiary, the defendant never produced, or even attempted to produce, any evidence that he intended to change his life style, habits, or conduct, or that he had made any effort whatsoever toward rehabilitating himself. Again upon retrial, the defendant failed to show this court any sign or intention of refraining from criminal conduct in the future, nor did he give any indication upon retrial that he no longer posed a violent and continuing threat to our society.

Signed and Entered this the 24th day of February, 1981.

Naomi Harney

Judge of the 251st District Court
in and for
Randall County, Texas